No. 80-1788

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In the Supreme Court of the United States

OCTOBER TERM, 1980

DENNIS SCHOENDORF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the search of a tractor-trailer violated petitioner's Fourth Amendment rights and warranted the exclusion of the evidence obtained.

2. Whether a statement made by petitioner following his arrest should have been excluded from evidence.

3. Whether one of petitioner's convictions should be reversed because the government failed to prove that the goods stolen by petitioner were part of an interstate shipment, as charged in the indictment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is not yet reported. The opinion of the district court denying petitioner's motion to suppress (Pet. App. 17a-28a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1980. A petition for rehearing was denied on February 25, 1981. The petition for a writ of certiorari was filed on April 24, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted of unlawfully appropriating goods in interstate commerce, in violation of 18 U.S.C. 659 (Count I), breaking custom seals,

in violation of 18 U.S.C. 549 (Count II), and transporting stolen property in interstate commerce, in violation of 18 U.S.C. 2314 (Count III).[1] He was sentenced to concurrent terms of five years' imprisonment on Count I and two years' imprisonment on Count II. Imposition of sentence on Count III was suspended and petitioner was placed on five years' probation to begin after he had served his other sentences.

The evidence showed that on the evening of March 22, 1979, petitioner, Ronald Jacobs, and Richard Suello stole containers of veal (valued at $93,600) and beef (valued at $36,400) from a warehouse in New Haven, Connecticut (Tr. 54, 56-58, 67-69, 78-79, 103, 117, 123-124, 139-142).[2] The containers had been shipped from New Zealand to New Jersey, where they were placed under seal by the United States Customs Service and then transported to the New Haven warehouse (Tr. 8-52, 54, 58, 74-75, 78). Several days after the thefts, Jacobs attempted to arrange a sale of the meat to an FBI undercover agent posing as a trafficker in stolen goods (Tr. 412-414, 455-460). Jacobs provided the agent with a sample of the veal, then broke off negotiations without explanation (Tr. 374-376, 461-464). That evening Suello and petitioner transported a trailer containing the veal to New Jersey (Tr. 179-183, 186-191), where, several days later, federal agents arrested Suello and seized the trailer (Tr. 199-200). The following day, federal agents discovered and seized the trailer containing the stolen beef, which had remained in Connecticut. Petitioner and Jacobs,

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[1] Ronald Jacobs was tried with petitioner and convicted on the same charges. He has filed a separate petition for a writ of certiorari, No. 80-1588. Petitioner adopts the contentions made by Jacobs. We have previously answered those contentions in our Brief in Opposition in No. 80-1588, a copy of which has been sent to petitioner's counsel.

[2] "Tr." refers to the trial transcript.

apparently unaware of this, made arrangements to sell the beef to the undercover agent and to deliver it to Buffalo, New York (Tr. 350-358, 362-363, 376-380, 423, 425, 468-476).

ARGUMENT

1. Petitioner contends (Pet. 13-16) that the stolen beef was seized following an illegal search. The district court, after a hearing, denied petitioner's motion to suppress this evidence, and the court of appeals affirmed.

a. The district court found, and the evidence at the suppression hearing showed, that at approximately 3:30 a.m. on March 31, 1979, a source who had proved reliable in the past and whose information in the past had led to at least ten arrests and six convictions (I S.H. 107-108)[3] contacted the F.B.I. He reported that part of the stolen shipment of meat was in a refrigerated tractor-trailer parked in a lot across the street from a Ramada Inn in West Haven, Connecticut (Pet. App. 17a-18a; I S.H. 18, 57-58, 107-109, 115-117). The informant described the trailer and said it might be moved soon (Pet. App. 18a; I S.H. 19). F.B.I. agents drove to the lot and found a trailer closely fitting the description given by the informant parked in the precise location specified by the informant—a corner of the lot, backed as far as possible into a wooded area bordering the lot (Pet. App. 18a-19a; I S.H. 20). The trailer was secured with a padlock and its refrigeration unit was running (Pet. App. 19a; I S.H. 20, 24). The tractor had no license plates; the trailer had a Pennsylvania license plate (I S.H. 20). The driver's side window of the tractor was down, and the door was unlocked (Pet. App. 19a; I S.H. 21). An agent opened the door to see if anyone was inside the tractor; he observed wires hanging down under the dashboard in a manner

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[3] "I S.H." and "II S.H." refer to the hearings on petitioner's motion to suppress held on February 15, 1980 and March 11, 1980, respectively.

which suggested that someone had tampered with the ignition (Pet. App. 19a; I S.H. 21-22, 60). A check of the Pennsylvania license showed that the trailer was registered to Michael Erdle of Lewisburg, Pennsylvania, and that neither the trailer nor the tractor had been reported stolen (I S.H. 22). Agents investigating the case had never before heard of Erdle (I S.H. 23).

An agent placed the tractor-trailer under surveillance for one hour (Pet. App. 19a; I S.H. 23), after which he telephoned an Assistant United States Attorney, who agreed that the trailer should be searched (Pet. App. 19a-20a; I S.H. 23). An agent then opened the trailer and discovered the stolen meat (Pet. App. 20a; I S.H. 25-26, 68-69).

Near the end of the suppression hearing, the district court cited *Rakas* v. *Illinois*, 439 U.S. 128 (1978), and suggested that petitioner had not shown that he had "standing" to challenge the search "either by way of possessory interest or a sufficient expectation of privacy" in the tractor-trailer (I S.H. 174-175). The court scheduled another hearing for approximately three weeks later to give petitioner an opportunity to address this issue. At the second hearing petitioner called one witness, Suello, who testified that either petitioner or co-defendant Jacobs, "I don't remember which, but one of them said [the trailer] was theirs" (II S.H. 212-213). Suello also testified that he had occasionally seen the trailer in the yard of the garage run by petitioner and Jacobs (II S.H. 209-210) and had seen either petitioner or Jacobs move it from one place to another at the garage (II S.H. 206-209).

The district court explicitly discounted Suello's testimony relating to ownership, noting that it was hearsay and questioning the credibility of both Suello and the defendant who allegedly claimed to own the trailer (Pet. App. 25a-26a). The court held that petitioner had failed to show an interest entitled to Fourth Amendment protection and

denied the motion to suppress (Pet. App. 26a-27a). The court of appeals affirmed, saying (Pet. App. 6a): "On the facts here, where neither appellant was present at the time of the search, the tractor had no registration plates and the trailer was registered to a Pennsylvanian not involved in the investigation or trial, and all evidence of appellants' ownership was based on the questionable testimony of witness Suello, we hold that the court did not err in finding that appellants had not sustained their burden of establishing standing by the evidence offered at the hearing on the motion to suppress."

b. For several reasons, petitioner's contention does not merit further review. First, at the suppression hearing petitioner's efforts to show "[]either a property []or a possessory interest" (*Rakas* v. *Illinois, supra,* 439 U.S. at 148) in the trailer were limited to Suello's vague testimony. The district court was entitled to discount this testimony, and it did so. Even if it had not, the evidence presented at the suppression hearing showed, at the most, that petitioner and Jacobs occasionally used the trailer and may have claimed to own it. Petitioner did not establish that he was using the trailer at the time of the search; and as the district court said, "the fact of registration of the trailer to a third party suggests that that party is the owner of the trailer" (Pet. App. 25a).

Moreover, even if petitioner did own and control the trailer, the circumstances in which it was discovered suggested that it had been abandoned. The trailer was reliably reported to be carrying contraband, and was registered to a person apparently unconnected to the case; the tractor bore no license plate and showed signs of having been tampered with. Under these circumstances, both the agents at the scene and the district judge at the suppression hearing could have reasonably concluded that the trailer was very recently stolen, used, and then abandoned by those who stole the meat.

Petitioner correctly asserts (Pet. 14-16) that at the trial the government attempted to link petitioner to the trailer. Notably, the government introduced evidence that the tractor had been sold to petitioner a few months before the search. But petitioner cannot rely upon this evidence in support of his Fourth Amendment claim. As the government explained to the court of appeals (Brief for Appellee at 20), at the time of the suppression hearing it did not know that the tractor had been sold to petitioner. In contrast, as the district judge said when petitioner attempted to reopen the suppression question at trial, "[i]t is inconceivable * * * that [petitioner] didn't know, if, in fact he did enter into a transaction [to purchase the tractor] * * * that he had done so" (Tr. 372). Thus the trial judge correctly ruled that petitioner's failure to adduce evidence of ownership at the suppression hearing could not be excused (Tr. 371-372). Petitioner had the burden of establishing that he had a Fourth Amendment interest in the trailer (*Rakas* v. *Illinois, supra,* 439 U.S. at 130-131 n.1, citing *Simmons* v. *United States,* 390 U.S. 377, 389-390 (1968), and *Jones* v. *United States,* 362 U.S. 257, 261 (1960)), and any testimony he gave in an effort to do so could not have been used against him at trial (*Simmons* v. *United States, supra,* 390 U.S. at 389-394). Despite ample opportunity to make his showing at the suppression hearing, petitioner failed to do so. In any event, the court of appeals held that "the trial testimony did not add in any significant degree to the evidence considered and found insufficient at the suppression hearing" (Pet. App. 6a-7a).

The second reason that petitioner's Fourth Amendment claim does not warrant further review is that the search was lawful. The general principle is that motor vehicles may be searched, on probable cause, without a warrant. See, *e.g., Chambers* v. *Maroney,* 399 U.S. 42, 48 (1970). Here there can be no doubt that the agents had probable cause to search the trailer. An informer who had repeatedly proved

his reliability gave them a precise description of the tractor, the trailer, and their location, all of which were confirmed, and said that the trailer contained a shipment of beef that the agents knew to be stolen. And it is clear that the tractor-trailer was searched under conditions in which a warrant was unnecessary.

"There are essentially two reasons for the distinction between automobiles and other private property. First, * * * the inherent mobility of automobiles often makes it impracticable to obtain a warrant * * *. In addition, the configuration, use, and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property." *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979). The tractor-trailer was, if anything, far more "mobile" than the automobile the search of which was upheld in *Chambers* v. *Maroney, supra;* the tractor-trailer was parked in a location from which it could be easily moved, and the agents had reliable information that it was about to be moved. Moreover, the "configuration, use, and regulation" of a refrigerated tractor-trailer make expectations of privacy in it considerably weaker than those an owner might have in an automobile. A refrigerated tractor-trailer is characteristically used for commercial purposes—it is, obviously, unlikely that it would be used to keep personal effects—and it and its contents are subject to routine and extensive regulation and inspection.[4]

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[4]The contrast with *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), where this Court refused to uphold the search of an automobile, is instructive. In *Coolidge*, the plurality noted (*id.* at 460):

> [T]he police had known for some time of the probable role of the * * * car in the crime. [The defendant] * * * had been extremely cooperative throughout the investigation, and there was no indication that he meant to flee. He had already had ample opportunity to destroy any evidence he thought incriminating. There is no suggestion that, on the night in question, the car was being used for any illegal purpose, and it was regularly parked in

Finally, there was abundant evidence linking petitioner to the theft of both the veal and the beef. Suello's testimony detailed petitioner's role, and the undercover agent to whom petitioner and Jacobs attempted to sell the stolen goods testified to those transactions. Under the circumstances, any error in the admission of evidence connected to the search of the trailer, which contained only the stolen beef, appears to have been harmless.

2. Petitioner also contends (Pet. 16-24) that an incriminating statement he made after his arrest should have been suppressed because it was obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

a. When petitioner surrendered to the authorities he was accompanied by his attorney. After being informed of his rights he invoked his right to remain silent (I S.H. 33-34). He was then left with agents who fingerprinted him, photographed him, asked him his height, weight, address and other routine information for processing purposes (I S.H. 101). An F.B.I. agent testified that in the course of this routine questioning (I S.H. 101-102):

> [W]e asked him, * * * "Do you have any vehicles other than," you know, "the blue Lincoln that was seized down there?"
>
> He said, "Well, no, you know, because I'm partner in the used car lot, but[']" he said, "about that blue Lincoln, when I'm going to get that thing back?"

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the driveway of [the defendant's] house. * * * The objects that the police are assumed to have had probable cause to search for in the car were neither stolen nor contraband nor dangerous.

Here, the authorities had just learned of the tractor-trailer at three o'clock in the morning, and they learned that it was being used in connection with a crime. They also learned that it would shortly be moved; and they were searching for contraband.

> I said, "Gee, you'll have to ask Special Agent Weinschenk. He's the one. He's a Customs agent."
>
> And Special Agent W[e]inschenk said, "Well, we're going to keep it because it was seized as an instrumentality of a crime, as evidence, and we're going to hold it until disposition by the Court. Because it was—you know, it was used to haul some meat down there in New Jersey."
>
> And at that point [petitioner] said to me, if I remember correctly, he said, "The meat was never in that car." * * *
>
> And we naturally said, "Well, would you care to elaborate on that?"
>
> And he smiled and said, "No. I'm not going to say anything further."

Petitioner's statement about the meat was introduced at the trial over his objection (Tr. 604-605). On appeal, the Second Circuit held that petitioner's remarks were "unsolicited answers to permissible personal data questions" (Pet. App. 9a). The court said: "there was no leading conversation, no devious questions, and no attempt to evade *Miranda* safeguards" (*ibid.*). The court concluded (*ibid.*) that the arguments against suppressing petitioner's statements were "stronger * * * for the government than" those accepted by this Court in *Rhode Island* v. *Innis*, 446 U.S. 291 (1980).

b. The court of appeals' holding is correct. Apparently, neither petitioner nor his counsel objected to the other personal identification questions asked by the agents; in any event, petitioner concedes (Pet. 23-24) that such questions are appropriate. See *United States ex rel. Hines* v. *LaVallee*, 521 F. 2d 1109 (2d Cir. 1975), cert. denied, 423 U.S. 1090 (1976). Asking the defendant whether he is an automobile owner, and if so how many automobiles he

owns, is not an inherently suspicious or obviously inappropriate form of personal identification; and the agents asked no other questions.

In any event, petitioner's ownership of the Lincoln was apparently not in issue, so his answer to the question did not damage him. The remark that may have damaged[5] petitioner—his statement about the beef—was admissible for several reasons. First, it was not the product of "interrogation" within the meaning of *Miranda*. Petitioner asked about the Lincoln and received a straightforward response; there is no reason to believe that Agent Weinschenk intended to do anything other than answer petitioner's question (see *Rhode Island* v. *Innis, supra*, 446 U.S. at 301-302, 303 & nn. 7, 9). As the court of appeals suggested, the police officers' remarks in *Innis* were, if anything, more contrived and less easily explainable as something other than an effort to obtain information from the defendant. Moreover, Agent Weinschenk could not reasonably have known (see *id.* at 301-303) that his answer to petitioner's question, an answer that may well have been a matter of public record, would have elicited an incriminating response. Indeed, it is difficult to see how the agent could have answered petitioner's question in any other way without misleading petitioner or suggesting that the automobile was being held at the authorities' discretion—a suggestion that itself might have been coercive.[6]

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[5]Here, again, the admission of petitioner's statement may well have been harmless in view of the other evidence introduced against him. See page 8, *supra*.

[6]For similar reasons, the agents did not " 'deliberately elicit[]' " information from petitioner in the absence of counsel. See *Rhode Island* v. *Innis, supra*, 446 U.S. at 300 n.4; *Brewer* v. *Williams*, 430 U.S. 387, 399-401 (1977); *Massiah* v. *United States*, 377 U.S. 201, 206 (1964).

Finally, petitioner himself appears to have "initiat[ed] [the] exchange[]" (*Edwards* v. *Arizona*, No. 79-5269 (May 18, 1981), slip op. 7) that led to his statement about the beef. The subject of contraband did not arise at all until petitioner began an independent conversation about the reason his car had been seized. Once petitioner made that inquiry, the agents could not give a truthful answer without mentioning the unlawful activity charged against petitioner.

3. Finally, petitioner contends (Pet. 24-32) that his conviction on Count I should be reversed because the indictment charged a theft from an interstate shipment and the government proved a theft from a foreign shipment. This contention is wholly without merit. The statute on which Count I was based, 18 U.S.C. 659, prohibits theft from either interstate or foreign shipments. Petitioner contends that the meat was part of a foreign shipment because it was still under a customs seal. But " '[c]onvictions are no longer reversed because of minor and technical deficiencies which did not prejudice the accused.' " *Russell* v. *United States*, 369 U.S. 749, 763 (1962), quoting *Smith* v. *United States*, 360 U.S. 1, 9 (1959). See also Fed. R. Crim. P. 52(a). The government proved that the meat was under customs seals, which were broken by petitioner; and it was undisputed that the meat had been moved from New Jersey to Connecticut before it was stolen. Thus it is difficult to imagine a more technical objection to the indictment than that raised by petitioner. Petitioner suggests no way in which he was prejudiced by this supposed defect, and plainly he could not have been.[7]

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[7]Petitioner's reliance on *Stirone* v. *United States*, 361 U.S. 212 (1960), is misplaced. In *Stirone* the defendant was charged with violating the Hobbs Act, 18 U.S.C. 1951, by interfering with interstate commerce. The indictment charged interferences with the movement of sand into Pennsylvania; the government was allowed to prove interference with the movement of steel out of Pennsylvania. *Id.* at 217. Plainly, this variance might have affected the defendant's rights in a way the variance alleged by petitioner did not.

In any event, there is no variance in this case. Courts have emphasized that 18 U.S.C. 659 was designed by Congress to promote the flow of goods in interstate commerce, and that Congress's purpose "is not to be hampered by technical legal conceptions." *United States* v. *Astolas*, 487 F. 2d 275, 279 (2d Cir. 1973), cert. denied, 416 U.S. 955 (1974). See also *United States* v. *Waronek*, 582 F. 2d 1158, 1161 (7th Cir. 1978); *United States* v. *Augello*, 452 F. 2d 1135, 1141 (2d Cir. 1971); *United States* v. *Berger*, 338 F. 2d 485, 487 (2d Cir. 1964), cert. denied, 380 U.S. 923 (1965). Consequently, there is no reason to believe, as petitioner asserts without citing authority (Pet. 26), that a shipment must be either interstate or foreign and cannot be both.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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